Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

JOHN D. LaFAVER,

Petitioner,

v.

DAVID PRAGER, III,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in deciding a rule 12(b)(6) motion based on qualified immunity, a District Court *must* consider documents quoted in the plaintiff's complaint when the defendant attaches those documents to its motion.

2. Whether the lower courts erred in the application of qualified immunity principles to the plaintiff's alleged free speech claims.

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The decision of the United States Court of Appeals for the Tenth Circuit upholding the refusal by the United States District Court for the District of Kansas to consider documents attached to the motion to dismiss and denial of defendant's motion to dismiss is reported, 180 F.3d 1185 (10th Cir. 1999), and is included as Appendix A. The opinion of the United States District Court for the District of Kansas is also reported, 5 F. Supp. 2d 906 (D. Kan. 1998), and is included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the decision of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1) and pursuant to the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The Tenth Circuit issued its decision on June 15, 1999, and this petition has been filed within ninety days of that date, as required by Supreme Court Rule 13.1.

STATUTES AND RULES OF CIVIL PROCEDURE INVOLVED

The statute involved in this case is 42 U.S.C. § 1983, which is set out verbatim in Appendix C.

The Rule of Civil Procedure involved in this case is Fed. R. Civ. 12(b), which is set out verbatim in Appendix C.

STATEMENT

Procedural History.

Respondent, David Prager, III, an attorney formerly employed within the Kansas Department of Revenue, sued petitioner, former Kansas Secretary of Revenue John D. LaFaver,[1] in his individual capacity, under 42 U.S.C. § 1983, alleging that Mr. LaFaver had deprived respondent of his free speech rights under the First Amendment and liberty interests under the Fourteenth Amendment.

Petitioner filed a motion to dismiss for failure to state a claim upon which relief can be granted, based on the defense of qualified immunity, attaching five documents to the motion to dismiss. Portions of three of the documents attached to the motion to dismiss were directly quoted in and referred to in respondent's complaint and were alleged by respondent to be central to his claims.

The District Court refused to consider any of the documents attached to petitioner's motion to dismiss. Consequently, it denied petitioner's motion to dismiss as to respondent's free speech claim (the District Court granted the motion as to respondent's liberty interest claim; however, this claim is not at issue in this petition). The Tenth Circuit affirmed, holding that the District Court was not required to consider the documents attached to petitioner's motion to dismiss, even though portions of those documents were quoted, referred to, and heavily relied upon by respondent in his complaint.

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[1] Mr. LaFaver has since been appointed Deputy Commissioner for Modernization with the Internal Revenue Service.

Statement of Facts.

1. The Facts.

Respondent, David Prager, III, was employed as a classified staff attorney within the Kansas Department of Revenue ("**the Department**") since 1983. *See* Appellant's Appendix in the Tenth Circuit ("Tenth Cir. App.") at 2, ¶ 5. In late 1996, various local newspaper articles criticized the Department; petitioner; and, specifically, respondent himself, relating to the fairness of income tax collection against corporations in Kansas. *Id.* at 37-46. Petitioner submitted an official response to the newspaper that had published negative articles. The response did not include any specific defense of respondent. Subsequently, on December 18, 1996, respondent sent a three-page letter and a twelve-page memorandum, with attachments, to Kansas Governor Bill Graves. *Id.* at 20-69. Although respondent alleged in his complaint that his letter and memorandum addressed several areas of "public concern," in reality his letter and memorandum concerned only issues personal to respondent.[2]

On January 8, 1997, respondent's employment with the Department was suspended with pay. On March 17, 1997, while respondent's employment was suspended, he sent Governor Graves a second letter and memorandum, which for the first time contained allegations of potential wrongdoing by petitioner and the Department's general

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[2] It is quite clear from reviewing respondent's letter and memorandum to Governor Graves that respondent's sole motivation for writing Governor Graves was his personal irritation with the newspaper articles and petitioner's response to those articles.

counsel. *Id.* at 4, ¶ 11. Respondent's employment with the Department was terminated on May 16, 1997. *Id.* at 4, ¶ 12.

2. The District Court.

On November 5, 1997, respondent filed a complaint in the United States District Court for the District of Kansas seeking relief under 42 U.S.C. § 1983 for the alleged deprivation of his First Amendment free speech rights and his Fourteenth Amendment liberty interest rights. *Id.* at 5B and 5C. In his complaint, respondent quoted directly from and referred to portions of his letter and memorandum to Governor Graves, and petitioner's January 8, 1997, and May 9, 1997, letters, but did not attach those documents to his complaint.

On December 8, 1997, petitioner filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted, based on various grounds, including the defense of qualified immunity. *Id.* at 6. Petitioner attached five documents to his motion to dismiss: respondent's letter and memorandum to Governor Graves, with respondent's attachments thereto, dated December 18, 1996; petitioner's letter suspending respondent's employment with pay, dated January 8, 1997; petitioner's letter proposing the termination of respondent's employment, dated May 9, 1997; petitioner's letter informing respondent of the termination of his employment, dated May 16, 1997; and petitioner's letter informing respondent of additional grounds for the termination of respondent's employment, dated July 30, 1997. *Id.* at 20-89.

On April 10, 1998, the District Court entered its Memorandum and Order denying petitioner's motion to dismiss as to respondent's free speech claim. The District Court refused to consider any of the documents attached to petitioner's motion to dismiss.[3]

In making its finding, the District Court accepted respondent's allegations of "public concern" without considering the documents attached to petitioner's motion to dismiss. These documents clearly would have provided the District Court with facts relating to the manner, time, and place of respondent's speech, the context surrounding and the events leading up to respondent's speech, and the context of respondent's entire letter and memorandum to Governor Graves.

The District Court found that petitioner's argument in his motion to dismiss involved "unsupported factual allegations," and therefore "[petitioner] has [failed to] demonstrate[ ] that the state interest in the 'efficiency of office' outweighs [respondent]'s strong First Amendment interest in reporting possible official misconduct." App. B at 25.

After finding that respondent's complaint had sufficiently alleged that his speech involved matters of "public concern," the District Court further held that "[t]he law *in a general sense* was clearly established at the time of the events in question here." App. B at 27 (emphasis

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[3] The District Court granted petitioner's motion to dismiss as to respondent's liberty interest claim for failing to allege that he was not afforded an adequate name-clearing hearing, but also granted respondent forty-five days' leave to file an amended complaint in order to attempt to cure his pleading defects. *Id.* at 21.

added). The District Court cited, as the clearly established law, this Court's opinion in *Rankin v. McPherson*, 483 U.S. 378, 383 (1987), and an unpublished opinion from the Tenth Circuit, *Arnold v. Board of County Comm'rs*, 1996 WL 84125 (Feb. 27, 1996 10th Cir. 1996) (the unpublished disposition may be found at 77 F.3d 492). Based on these decisions, the District Court found that "[petitioner] should reasonably have been on notice that plaintiff's speech was protected and that plaintiff's free speech interests could outweigh the state's interest in 'efficiency of office.' " App. B at 27.

3. The Tenth Circuit.

A three-judge panel of the Tenth Circuit affirmed the District Court's decision.

The Tenth Circuit held that, although its decision in *GFF Corp. v. Associated Wholesale Grocers, Inc.* allows a defendant to attach such documents to a motion to dismiss without converting the motion into a motion for summary judgment, "nothing in *GFF Corp. . . . requires* the district court to consider the materials Mr. LaFaver attached to his motion." App. A at 6. The Tenth Circuit stated further that "[n]umerous other circuits use language indicating district court's [sic] have discretion in deciding whether to consider such materials." *Id.* (citing *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994); *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991)).

The Tenth Circuit also affirmed the District Court's finding that respondent had adequately alleged in his complaint that his letter and memorandum to Governor Graves touched on matters of public concern. App. A at 10. The Tenth Circuit held that respondent's interests, under the *Pickering*[4] balancing test, outweighed the government's interest in preventing workplace disruption. *This could only have been derived from a review of the portions of petitioner's May 9, 1997, letter quoted by respondent in his complaint. Id.* at 11. Finally, the Tenth Circuit held that the law was "clearly established that an employee's strong interest in disclosing governmental corruption outweighs unsubstantiated assertions of workplace disruption, and put [petitioner] on notice that the conduct alleged in [respondent]'s complaint would violate the law." *Id.* at 12.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION RAISES AN IMPORTANT UNSETTLED ISSUE OF LAW AND RESOLVES IT IN A WAY THAT IS WHOLLY INCONSISTENT WITH THE LAW THAT A DISTRICT COURT IS REQUIRED TO CONSIDER DOCUMENTS ATTACHED TO A COMPLAINT BY A PLAINTIFF.

A. The Circuits Unanimously Agree that District Courts Deciding 12(b)(6) Motions *Must* Consider Documents Attached to a *Plaintiff's* Complaint.

No less than nine Circuits are unanimous in holding that a defendant may attach to a Rule 12(b)(6) motion materials referred to by the plaintiff and central to his

[4] *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

claim, without converting the motion into a motion for summary judgment. *See Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *GFF Corp. v. Associated Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 n.9 (8th Cir. 1997); *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997); *New Beckley Mining Corp. v. International Union, UMWA*, 18 F.3d 1161, 1164 (4th Cir. 1994); *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1193, 1196 (3d Cir. 1993); *I. Meyer Pincus & Assocs. P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991).

Nonetheless, the Tenth Circuit held in this case that district courts have *discretion* as to whether to consider those documents attached to a Rule 12(b)(6) motion by the defendant. App. A at 7. In making its decision, the Tenth Circuit failed to provide an analysis of the law that when documents become part of the *pleadings* (as when attached by a *plaintiff*), a district court *must* consider those documents in ruling on a Rule 12(b)(6) motion, notwithstanding the fact that appellant very thoroughly briefed that point to the Tenth Circuit.

The law in several circuits, including the Tenth Circuit,[5] is that when a defendant attaches to a Rule 12(b)(6) motion documents that are referred to by the plaintiff and

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[5] *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381 (10th Cir. 1997), which the Tenth Circuit cited in its opinion.

are central to the plaintiff's claim, those documents are not considered "matters outside the pleadings," but rather become *part of the pleadings. See e.g., Nieman v. NLO, Inc.*, 108 F.3d 1546, 1555 (6th Cir. 1997) (holding that documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim).

Moreover, the uniform rule is that when a *plaintiff* attaches documents to a complaint, the documents not only become part of the pleadings, but *must* be considered by the court. *See* 5 CHARLES ALAN WRIGHT & ARTHUR P. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1327 (2d ed. 1990) at 764-65 (stating that the contents of any writing attached to the complaint must be considered in determining the existence of a defense on a motion to dismiss for insufficiency).[6] Indeed, when facts contained within

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[6] *See also Simmons v. Peavey-Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir. 1940), *cert. denied*, 311 U.S. 685 (1940); *see also Austin v. Ford Models, Inc.*, 149 F.3d 148, 152 (2d Cir. 1998) (stating that when reviewing a court's dismissal of a plaintiff's complaint, the court of appeals will consider attachments to the pleadings); *Ala, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1994) (holding that when a court reviews a complaint, the court should consider the exhibits attached to the complaint); *Mengel Co. v. Nashville Paper Prods. & Specialty Workers Union No. 513*, 221 F.2d 644, 647 (6th Cir. 1955) (holding that in ruling on a motion to dismiss, a document attached to a complaint becomes a part of the complaint and will be considered on a motion to dismiss); and *Interstate Natural Gas Co. v. Southern Cal. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953) (basing its decision to affirm the district court's dismissal, in part, on documents attached to plaintiff's complaint).

the attached documents conflict with facts alleged in a complaint, the attached documents are *controlling*. *See Ala, Inc., supra,* 29 F.3d at 859 n.8; *Simmons, supra,* 113 F.2d at 813; *Mengel, supra,* 221 F.2d at 647; 5 WRIGHT & MILLER, § 1327 at 766-67.

Logically, the same rule must apply when a plaintiff puts the documents into play by quoting and referring to only a portion of the documents in the complaint but fails to attach the documents, as the result of which the defendant naturally seeks to provide the district court with the entire document to consider in ruling on the defendant's Rule 12(b)(6) motion. Such documents, when attached to a Rule 12(b)(6) motion by a defendant, *must* be considered by the district court, just as if the *plaintiff* had attached those same documents to the plaintiff's complaint.

B. Logic Dictates that when a Plaintiff Quotes Documents in the Complaint but Fails to attach them, a District Court Deciding a Rule 12(b)(6) Motion *Must* Consider those Documents if the *Defendant* So Requests.

It is impossible to reconcile the Tenth Circuit's opinion that the District Court's decision to consider documents attached to a Rule 12(b)(6) motion by a defendant is discretionary with the uniform rule that a court must consider documents attached to a complaint by the plaintiff in ruling on a Rule 12(b)(6) motion. The Tenth Circuit's opinion can only result in an arbitrary and inequitable distinction between plaintiffs and defendants relating to an important and otherwise well-established rule throughout the Circuits that documents attached to a

complaint by a plaintiff must be considered by the district court. With all due respect, the Tenth Circuit erred, and its ruling raises a substantial question that this Court should resolve.

Whether a district court is required to consider the documents attached to a defendant's Rule 12(b)(6) motion may often be central to the defense of qualified immunity, and may be dispositive, as it was in this case. Indeed, in a virtually identical lawsuit respondent filed against petitioner (among others) in Kansas state court,[7] the state district judge, after citing federal case law, did not hesitate to review the documents attached to the defendants' motion to dismiss.[8] Based on that review of the documents, the state district judge dismissed respondent's case in its entirety. This vividly illustrates the importance of the documents that were attached to petitioner's Rule 12(b)(6) motion, and indeed strengthens petitioner's assertion that this is a substantial question that this Court should resolve.

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[7] *Prager v. State of Kansas, et al.*, Case No. 99-C-17 (D.C. of Shawnee County, Kansas July 1, 1999). A copy of the state district court's memorandum decision and order dismissing respondent's case in its entirety is attached to this petition as Appendix D.

[8] The state district judge did not consider the final two documents that were attached to the defendants' motion to dismiss, because they were not specifically referenced in respondent's state court petition. The court could have done so, however, under *Caraluzzi v. Prudential Secs., Inc.*, 824 F. Supp. 1206, 1210 n.1 (N.D. Ill. 1993).

C. The Issue is Substantial and Recurring, thus Meriting Review by This Court.

The issue of whether a district court *must* review documents properly attached to a motion to dismiss raises an important and recurring issue. There are literally thousands of reported cases filed under 42 U.S.C. § 1983 in which qualified immunity is raised as a defense. When the defense of qualified immunity is an issue in a case involving an alleged violation of a plaintiff's First Amendment rights, a district court is required to balance the plaintiff's interest in making his statement against the state's interest in the effective and efficient fulfillment of its responsibilities to the public. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). In balancing the competing interests, the plaintiff's statement cannot be considered in a vacuum, and the manner, time and place, and the context of the statements are relevant considerations. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Documents that a plaintiff specifically quotes and which a defendant thus logically attaches to a Rule 12(b)(6) motion necessarily provide a district court with information critical to considering fully the manner, time, place, and the context of the statements at issue. This Court has long held and repeatedly made clear that qualified immunity provides to a defendant not only a defense to liability but also immunity to suit, including the costs of trial and the burdens of broad reaching discovery. *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 2815 (1985). If that proposition is to have meaningful effect, a district court ruling on a Rule 12(b)(6) motion based on qualified

immunity must consider documents that are referred to by the plaintiff in the complaint and are central to the plaintiff's claim.

If a defendant in a § 1983 case is truly to be immune from the demands of litigation, the district court must be required to review those documents that are properly attached to the Rule 12(b)(6) motion. As the Tenth Circuit itself has stated, "[i]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied." *GFF Corp.*, 130 F.3d at 1385. This is especially true in the case of qualified immunity in the First Amendment context, because otherwise the district court must attempt to balance the parties' interests, without the ability to consider fully the manner, time, place, and the context of a plaintiff's statements, all of which must be available if the district court is required to consider the documents a defendant attaches to a Rule 12(b)(6) motion.

If district courts are not required to consider documents referred to by a plaintiff and which are central to the plaintiff's claim and which the defendant attaches to a Rule 12(b)(6) motion, the standards for a Rule 12(b)(6) motion as set forth in *Rankin* are meaningless. Defendants – who might otherwise be entitled to the defense of qualified immunity – will be forced to undergo all of the discovery demands of litigation with no possible recourse until summary judgment, a result that is seriously inconsistent with this Court's pronouncements regarding qualified immunity.

This substantial question affects numerous, similar § 1983 cases in which the doctrine of qualified immunity

applies. This Court has reiterated that qualified immunity is a necessary defense to a § 1983 claim because "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). To allow a plaintiff to plead artfully around the otherwise applicable defense of qualified immunity, particularly if the plaintiff brings a document into play by referring to or quoting from portions of a document that otherwise contains highly damaging information to plaintiff's claim, ignores the role that the qualified immunity must play in § 1983 cases.

Allowing defendants to have the same right the Circuits uniformly have recognized for plaintiffs does nothing other than ensure that appropriate cases be dismissed at the earliest possible point; *i.e.*, at the motion to dismiss stage, precisely this Court's holding in *Behrens* and *Mitchell*, for example. This case presents an excellent vehicle for deciding this purely legal question of whether a district court should be required to consider documents properly attached to a Rule 12(b)(6) motion by a defendant, without converting the motion to a motion for summary judgment. The question is clearly raised, preserved, and addressed in the opinion below, and is potentially dispositive in this case.

II. THE LOWER COURTS REQUIRE GUIDANCE CONCERNING THE APPLICATION OF QUALIFIED IMMUNITY PRINCIPLES TO FREE SPEECH CLAIMS.

Despite this Court's ruling that qualified immunity is a defense to the demands of litigation and therefore must

be resolved at the motion to dismiss stage in appropriate cases, lower courts may hesitate to apply qualified immunity at the motion to dismiss stage in alleged free speech cases simply because it is difficult for lower courts to conduct adequately the *Pickering* balancing test based solely on the facts alleged in the plaintiff's complaint. In this case, for example, although the District Court clearly acknowledged that the qualified immunity issue "is a legal one and the court cannot avoid the question by framing it as a factual issue," App. B at 22, the District Court nonetheless found that petitioner's argument for qualified immunity was "ineffectual at this stage of the litigation and is more appropriately raised in a motion for summary judgment." Specifically, the District Court concluded that petitioner's arguments "involve unsupported factual allegations and are not properly addressed at this stage of the proceeding" and that petitioner's argument "turns on several factual assumptions." App. B at 23, 25-26. Thus, the District Court avoided the legal question involving qualified immunity by framing the issues as factual, despite having previously acknowledged that it was making a legal determination.

Furthermore, although the District Court agreed that petitioner acted to protect important government interests, the court nevertheless stated that "it would be absurd to hold that the First Amendment generally authorizes [culpable] officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." App. B at 24-25. The District Court also required petitioner to "show actual disruption of services resulting from plaintiff's speech and that the

disruption outweighs the plaintiff's First Amendment rights." App. B at 24.

The problem with the District Court's (and any other lower court's) attempt to conduct the *Pickering* balancing test at the motion to dismiss stage is that government defendants, without the ability to attach documents to a Rule 12(b)(6) motion for the court's consideration, must somehow demonstrate the actual disruption of government operations that resulted from the plaintiff's speech. Certainly, a plaintiff has no interest whatsoever in alleging facts that would support a defendant's claim that the plaintiff's speech disrupted government operations.

In this case, for example, the Tenth Circuit attempted to conduct the *Pickering* balancing test by considering small excerpts from documents that the respondent specifically quoted in his complaint (the same documents the petitioner attached to his Rule 12(b)(6) motion and unsuccessfully asked both courts to consider), and compared those statements to plaintiff's claimed whistleblowing status. Clearly, such an analysis of the *Pickering* balancing test would always favor a plaintiff, thus always precluding the use of a Rule 12(b)(6) motion to assert successfully the qualified immunity defense in the First Amendment context.

A disinclination at the district court level to apply the defense of qualified immunity at the motion to dismiss stage is illustrated by the facts of this case. It is clear that the lower courts' rulings are directly contrary to the proposition that defendants who are entitled to qualified immunity are entitled to a dismissal at the earliest possible stage of the proceedings. Without guidance from this

Court, defendants, who apparently would otherwise be entitled to qualified immunity, must undergo the demands of litigation and exhaustive discovery procedures before a lower court will ever seriously consider the defense of qualified immunity.

If qualified immunity is to mean anything at the motion to dismiss stage, it is imperative that lower courts be required to review documents properly attached to a defendant's Rule 12(b)(6) motion. By failing to do so, the lower courts have essentially foreclosed a defendant's right to qualified immunity at the motion to dismiss stage, contrary to the dictates of this Court. This case involves a classic qualified immunity defense pertaining to the Secretary of Revenue of the State of Kansas. It could have and should have been disposed of by either of the lower courts (the Tenth Circuit was clearly empowered to consider the case *de novo*) at the motion to dismiss stage. If qualified immunity cannot apply to this case at the motion to dismiss stage, there is no case involving qualified immunity that can be disposed of at the motion to dismiss stage.

CONCLUSION

For the foregoing reasons, petitioner, John D. LaFaver, respectfully requests that the Court grant certiorari in this case to resolve the conflict between inconsistent rules that turn on whether a plaintiff or a defendant attaches documents to a complaint or a motion to dismiss. The issue is recurring and important, especially to governmental officials, who are not infrequently defendants in § 1983 suits.

Respectfully submitted,

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September, 1999

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

DAVID PRAGER, III, Plaintiff-Appellee, v. JOHN D. LaFAVER, Secretary of the Kansas Department of Revenue, In His Personal Capacity, Defendant-Appellant,	)	No. 98-3116

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 97-CV-4216-DES)

(Filed June 15, 1999)

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Before **SEYMOUR**, Chief Judge, **MAGILL**,* and **EBEL**, Circuit Judges.

SEYMOUR, Chief Judge.

John LaFaver, the Secretary of the Kansas Department of Revenue, fired David Prager, III, a former attorney with that organization, after Mr. Prager wrote several letters critical of the Department to Governor William Graves. Mr. Prager sued Mr. LaFaver for depriving him of his First and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. Mr. LaFaver filed a motion to dismiss based on qualified immunity and attached several documents thereto, including a letter from Mr. Prager to the Governor and several letters from Mr. LaFaver to Mr. Prager. The district court refused to consider the additional materials and treated defendant's motion as a motion to dismiss under Fed.R.Civ.P. 12(b)(6). It denied the motion as to the First Amendment claim and granted the motion with leave to amend as to the Fourteenth Amendment claim. Mr. LaFaver appeals, claiming that the district court erred by refusing to consider the materials appended to his motion to dismiss, and by denying him qualified immunity. We affirm.

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* The Honorable Frank J. Magill, Senior United States Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

I.

Mr. Prager was employed as senior tax attorney with the Kansas Department of Revenue.[1] In that capacity, he believed that the Department of Revenue was erroneously interpreting a Kansas statute, resulting in a significant illegal tax abatement to a corporation. On October 31, 1996, he wrote a memorandum to his supervisor, Richard Oxendale, General Counsel for the Department of Revenue, analyzing the legal issue, explaining the mistake, and requesting a meeting with Mr. Oxendale and Mr. LaFaver to discuss the matter. Mr. Oxendale never arranged the requested meeting.

On December 18, 1996, Mr. Prager sent a letter to Governor Graves discussing several problems within the Department of Revenue. He asserted that a tax abatement in a well-publicized case involving La Siesta Foods, Inc. was illegal.[2] He also addressed the role of political influence in the Department of Revenue's administrative process. Finally, he discussed the public's negative perception of the Department.

Because of this letter, Mr. LaFaver wrote to Mr. Prager on January 8, 1997, suspending him from his employment with pay. Mr. LaFaver opened by saying, "I am in receipt of your unfortunate correspondence to the

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[1] Because this appeal arises from a motion to dismiss pursuant to rule 12(b)(6), we accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the nonmoving party. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

[2] Mr. Prager's October memorandum to Mr. Oxendale did not pertain to the La Siesta Food abatement.

Governor regarding an array of tax issues at the Department of Revenue." Aplt. App. at 3. He continued, "That you chose to send such a letter to the Governor without discussing it with the General Counsel or me reflects poorly upon your judgment and your willingness and ability to work as member of this team." *Id.* Mr. Prager appealed his suspension, claiming that Mr. LaFaver retaliated against him for reporting the illegal tax abatement, thereby violating Kan. Stat. Ann. § 75-2973 (West 1996 Supp.), the Kansas whistle-blower statute.

In March 1997, Mr. Prager wrote another letter to Governor Graves expressing the concerns voiced in the October 1996 memorandum to Mr. Oxendale. He sent copies to Mr. LaFaver and Mr. Oxendale. Mr. LaFaver responded on May 9 advising Mr. Prager that he would be terminated from his employment with the Department of Revenue effective May 16. After his termination, Mr. Prager filed this action.

II.

We must first address whether the district court is required to consider materials that a defendant attaches to his motion to dismiss. Mr. LaFaver attached Mr. Prager's December 18 letter to Governor Graves and Mr. LaFaver's January 8, May 9, May 16, and July 30 letters to Mr. Prager. Mr. LaFaver did not attach Mr. Prager's October 31 memorandum to Mr. Oxendale nor his March 17 letter to the Governor. The district court refused to consider any of the attached materials, deciding the motion on the basis of the complaint and answer.

Mr. LaFaver asserts that the court was required to consider the documents attached to its rule 12(b)(6) motion, and that its failure to do so constitutes reversible error. Specifically, he argues that because Mr. Prager referred to and quoted from several of the letters in the complaint, those materials should be considered part of the pleadings. Mr. LaFaver recognizes that some of the attached letters were not referenced in Mr. Prager's complaint but contends that those materials are necessary to "complete the entire documentation surrounding the termination." Aplt. Br. at 12 n.8.

Mr. LaFaver primarily relies on *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381 (10th Cir. 1997), to support this argument. In *GFF Corp.*, this court upheld the district's court consideration of a letter that the plaintiff alleged satisfied the statute of frauds but did not attach to its amended complaint. *Id.* at 1385. We noted that, in general, a motion to dismiss should be converted to a summary judgment motion if a party submits, and the district court considers, materials outside the pleadings. *Id.* at 1384.[3] We then continued:

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[3] In fact, Fed.R.Civ.P. 12(b) specifically provides:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

> Notwithstanding these general principles, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.

Id.; *see also Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (noting that documents are not "outside the pleadings" if they are "referred to in the plaintiff's complaint and are central to his claim").

We find nothing in *GFF Corp.* that *requires* the district court to consider the materials Mr. LaFaver attached to his motion. We agree that *GFF Corp.* supports the proposition that the district court could have considered those documents Mr. Prager referred to in his complaint which were central to his claim without converting Mr. LaFaver's motion into one for summary judgment. Nevertheless, *GFF Corp.* did not purport to decide whether consideration of materials appended to a motion to dismiss is mandatory or discretionary. Numerous other circuits use language indicating district courts have discretion in deciding whether to consider such materials. *See, e.g., Brooks v. Blue Cross and Blue Shield of Florida*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court *may* consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal. . . . ") (emphasis added); *Wright*, 29 F.3d at 1248 ("[D]ocuments attached to a motion to dismiss [that] are referred to in the plaintiff's complaint and . . . central to his claim . . . *may* be

considered by a district court ruling on the motion to dismiss.") (emphasis added); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) ("[W]e hold that documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, *may* be considered in ruling on a 12(b)(6) motion to dismiss.") (emphasis added); *Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) ("We now hold that a court *may* consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on that document.") (emphasis added); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) ("[T]hough the district court . . . declined to consider these exhibits, it *could* have viewed them on the motion to dismiss because there was undisputed notice to plaintiffs of their contents and they were integral to plaintiff's claim.") (emphasis added). We agree with our sister circuits that if a defendant attaches to a 12(b)(6) motion materials referred to by the plaintiff and central to his claim, the court has discretion to consider such materials.

Here, the district court acted well within its discretion in declining to consider the documents attached to Mr. LaFaver's motion to dismiss. The attachments were both over-inclusive and under-inclusive. While Mr. LaFaver appended several documents referenced in Mr. Prager's complaint, he excluded two others, namely the October 31 memorandum to Mr. Oxendale and the March 17 letter to Governor Graves. In addition, Mr. LaFaver attached two documents, the letters of May 16 and July 30, that Mr. Prager did not refer to in his complaint.

Given that state of the record, it was reasonable for the district court to decide the motion without consideration of any of the appended materials.

III.

We now turn to the merits of Mr. LaFaver's motion to dismiss on the basis of qualified immunity. We review a district court's decision to grant or deny a motion to dismiss de novo. *See GFF Corp.*, 130 F.3d at 1384. A defendant may immediately appeal the denial of a 12(b)(6) motion based on qualified immunity to the extent that denial turns on an issue of law. *See Behrens v. Pelletier*, 516 U.S. 299, 307 (1996).[4]

"Under the doctrine of qualified immunity, 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 592-93 (10th Cir. 1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1994)); *see also Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992) ("If [defendants'] actions are those that a reasonable person could have believed were lawful, defendants are entitled to dismissal before discovery."). Qualified immunity protects government officials from being subjected to the

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[4] Mr. Prager contends we lack subject matter jurisdiction over the qualified immunity appeal because the district court merely held there were fact issues precluding a dismissal. *See Johnson v. Jones*, 515 U.S. 304, 313-14 (1995). We disagree. For the reasons set out *infra*, this appeal involves issues of law.

burdens of discovery and trial in meritless cases. *See Harlow*, 457 U.S. at 818.

Mr. LaFaver contends the law did not clearly establish that the First Amendment protected Mr. Prager's speech. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and its progeny set forth the applicable framework for determining the First Amendment rights of public employees like Mr. Prager. *See Moore v. City of Wynnewood*, 57 F.3d 924, 931 (10th Cir. 1995). Under this framework, we must first decide whether the employee's speech may be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). We determine this "by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147- 48. If the speech addressed a matter of public concern, we must next balance the employee's "interest in making [his] statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through it employees.' " *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (quoting *Pickering*, 391 U.S. at 568). These two steps in the inquiry present legal issues to be resolved by the court. *See Gardetto v. Mason*, 100 F.3d 803, 811 (10th Cir. 1996).[5]

We first address whether Mr. Prager's speech touched on matters of public concern. "Speech which

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[5] The final two steps, whether the protected speech was a substantial or motivating factor in the decision, and whether the employer would have reached the same decision absent the protected conduct, present questions of fact to be resolved by the jury, *Gardetto*, 100 F.3d at 811, and we do not consider them here.

discloses any evidence of corruption, impropriety, or other malfeasance on the part of [public] officials, in terms of content, clearly concerns matter of public import." *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988); *see also Considine v. Board of County Comm'rs*, 910 F.2d 695, 700 (10th Cir. 1990) (discussing Tenth Circuit cases in which whistle blowing activity was held to touch on matters of public concern); *cf. Ramirez*, 41 F.3d at 595. We must discern "whether the speech was calculated to disclose misconduct or dealt with only personal disputes and grievances with no relevance to the public interests." *Conaway*, 853 F.2d at 796.

Mr. Prager's letters discussed illegal tax abatements, the pervasive effect of political influence in the state tax system, and the negative perception of the Department of Revenue. All of these issues, and in particular Mr. Prager's disclosure of governmental corruption, relate to matters of "political, social or other concern to the community." *Connick*, 461 U.S. at 146; *see also Conaway*, 853 F.2d at 796-97. Under the clearly established law of this circuit, Mr. Prager's speech, as described by this record, touched on matters of public concern.

We must next engage in the *Pickering* balancing test, weighing the employee's right to speak on matters of public concern against government-employer's interest in efficiency. 391 U.S. at 568. "When balancing the rights of the employee against those of the employer, an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption." *Conaway*, 853 F.2d at 797. In evaluating the employer's interest, courts consider "whether the statement impairs discipline by superiors or

harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388. Nevertheless, an employee's speech will not be left unprotected simply because his "whistle blowing might jeopardize the harmony of the office or tarnish the integrity of the department." *Conaway*, 853 F.2d at 798; *see also Ramirez*, 41 F.3d at 595. Speculative assertions of workplace disruption are also insufficient, *see Wulf*, 883 F.2d at 862; rather, the employer must show " 'actual disruption of services which results from the employee[s'] speech.' " *Ramirez*, 41 F.3d at 594 (quoting *Schalk*, 906 F.2d at 496).

On this record, we must balance Mr. Prager's constitutional right to expose governmental misconduct against little evidence of governmental disruption. Mr. Prager's whistle blowing activity is entitled to substantial weight. *See Conaway*, 853 F.2d at 797. The only hint of governmental disruption comes from brief portions of Mr. LaFaver's letters quoted in the complaint. In the May 9 termination letter, Mr. LaFaver stated that Mr. Prager's insubordination and disclosure of privileged material, inter alia, "caused undue disruption of the normal operation and proper functioning of this Department." Aplt. App. at 5. Given that Mr. Prager's letters accused Mr. LaFaver of granting an illegal tax abatement, it is unsurprising that it created office tensions; however, that in itself does not render Mr. Prager's speech unprotected. *See Conaway*, 853 F.2d at 798; *cf. Wulf*, 883 F.2d at 862 ("In sum, there is simply insufficient evidence that the *letter itself* interfered with effective functioning of the police

department. Rather the evidence supports the conclusion that Wulf's letter was seeking to rectify malfunctions already present in the department."). Moreover, to the extent the complaint alleges that Mr. LaFaver hid his true motivation for suspending and terminating Mr. Prager behind the guise of promoting efficiency, we must accept that contention as true. We also note that Mr. Prager kept his speech within the Kansas state government, and did not speak to the press or public. *Cf. Conaway,* 853 F.2d at 797-98. Not surprisingly, Mr. Prager's First Amendment right outweighs unsubstantiated claims of governmental disruption.

We turn to the question of whether this law was clearly established when Mr. LaFaver acted against Mr. Prager. We recognize "a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate." *Melton v. City of Oklahoma City,* 879 F.2d 706, 729 (10th Cir. 1989), *overruled on other grounds,* 928 F.2d 920 (10th Cir. 1991) (en banc). Nevertheless, "to the extent that courts in analogous (but not necessarily factually identical) cases have struck the necessary balance, government officials will be deemed 'on notice.' " *Id.* n.36. Our decisions in *Conaway,* 853 F.2d at 797, and *Ramirez,* 41 F.3d at 595, clearly established that an employee's strong interest in disclosing governmental corruption outweighs unsubstantiated assertions of workplace disruption, and put Mr. LaFaver on notice that the conduct alleged in Mr. Prager's complaint would violate the law. We therefore hold the law was clearly established in Mr. Prager's favor at the time Mr. LaFaver suspended and terminated him.

IV.

We **AFFIRM** the district court's denial of Mr. LaFaver's motion to dismiss.[6]

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[6] We note that Mr. LaFaver may raise the issue of qualified immunity again on a motion for summary judgment after the record is more developed. *See Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 595 (10th Cir. 1994); *Workman v. Jordan*, 958 F.2d 332, 336 (10th Cir. 1992).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

DAVID PRAGER, III, Plaintiff, v. JOHN D. LaFAVER, Secretary of the Kansas Department of Revenue, in His Personal Capacity, Defendant.	CIVIL ACTION Case No. 97-4216-DES ENTERED ON THE DOCKET DATE: 4-10-98

MEMORANDUM AND ORDER

(Filed Apr. 10, '98)

I. INTRODUCTION

David Prager, III, a former tax attorney for the Kansas Department of revenue, brings this 42 U.S.C. § 1983 action seeking damages for the alleged deprivation of his First Amendment free speech rights and Fourteenth Amendment liberty interest.

This matter is before the court on defendant's motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss (Doc. 5). In his opposing memorandum, plaintiff suggests that since resolution of the motion requires consideration of matters outside the pleadings, it should be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The record, however, is insufficiently developed for the court to treat defendant's motion as one for summary judgment

since neither party has complied with the requirements of Fed. R. Civ. P. 56 and D. Kan. Rule 56.1. To conclude otherwise would result in a potentially unjust and unfair resolution of this matter. Accordingly, the court shall exclude matters outside the pleadings and treat defendant's motion as a motion to dismiss.

The court has considered the briefs of counsel, plaintiff's factual allegations and applicable law, and determines that oral arguments would not materially assist the court in its decision.

II. RULE 12(B)(6) MOTION TO DISMISS STANDARD

The court may not dismiss a cause of action for failure to state a claim under Rule 12(b)(6) unless it appears beyond doubt that the claimant can prove no set of facts supporting its claim which would entitle it to relief. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). In considering a Rule 12(b)(6) motion, the court must assume as true all well-pleaded facts, as distinguished from conclusory allegations, and must draw all reasonable inferences in favor of the nonmovant. *Housing Auth. of the Kaw Tribe v. City of Ponca City*, 952 F.2d 1183, 1187 (10th Cir. 1991); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support its claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. SUMMARY OF PLAINTIFF'S FACTUAL ALLEGATIONS

The pertinent allegations in plaintiff's amended complaint, which the court accepts as true, are summarized as follows:

Mr. Prager had been an Attorney III, classified civil service employee with permanent status with the Kansas Department of revenue since 1988. On October 31, 1996, Mr. Prager delivered a memo to his supervisor, Richard Oxandale, General Counsel for the Department of Revenue. This memo pertained to a corporate income tax appeal ("Tax Appeal A") for which Mr. Prager was responsible. The memo stated that the tax laws had been misinterpreted by Mr. Oxandale and Secretary LaFaver in another tax appeal ("Tax Appeal B"), which was being handled by another attorney in the Department of Revenue. Both Tax Appeal A and Tax Appeal B involved the same issue, namely, whether a federal agreement to extend the federal assessment limitation period extends the time period for a Kansas refund claim under Kan. Stat. Ann. § 79-3230(e).

In his memo of October 31, 1996, Mr. Prager informed Mr. Oxandale that little or no legal research had been done in arriving at the erroneous interpretation of Kan. Stat. Ann. § 79-3230(e) in Tax Appeal B, resulting in an illegal tax refund of $1.0 million to Taxpayer B. Mr. Prager's memo provided three pages of legal analysis, explaining why Kan. Stat. Ann. § 79-3230(e) had been erroneously interpreted by Mr. Oxandale and Secretary LaFaver in Tax Appeal B. Mr. prager's memo went on to request a meeting with Mr. Oxandale and Secretary

LaFaver to discuss their erroneous interpretation of Kan. Stat. Ann. § 79-3230(e) in Tax Appeal B, and to determine that the law should be properly followed in Tax Appeal A. Mr. Oxandale never arranged such a meeting.

On December 18, 1996, Mr. Prager sent a twelve-page letter to Kansas Governor Bill Graves, which included a number of lengthy attachments. The letter to Governor Graves addressed several issues which Mr. Prager alleges were of public concern. One of those issues was a well-publicized income tax controversy involving La Siesta Foods, Inc. Mr. Prager asserted that the tax abatement in the La Siesta case was illegal and that Secretary LaFaver was the one who had agreed to and caused the illegal La Siesta abatement. Mr. Prager also asserted that the Kansas Department of Revenue's administrative process had been circumvented by politics. Finally, Mr. Prager expressed his concern over taxpayers' perception of unfair treatment by the Kansas Department of Revenue.

On January 8, 1997, Secretary LaFaver sent a letter to Mr. Prager, suspending Mr. Prager from his employment with pay pursuant to Kan. Admin. Regs. 1-10-7. In the first sentence of this letter, the Secretary stated, "I am in receipt of your unfortunate correspondence to the Governor regarding an array of tax issues at the Department of Revenue." Referring to Mr. Prager's letter to the Governor, the Secretary went on to say, "You have imagined events that did not occur, and you have characterized actions of the Governor and me that I took with full legal advice as 'illegal'." The Secretary's letter further stated:

> that you chose to send such a letter to the Governor without discussing it with the General

> Counsel or me reflects poorly upon your judgment and your willingness and ability to work as a member of this team. Clearly the letter requires a thorough review of matters alluded to in the letter as well as other matters relating to the fairness and propriety of actions the department has taken in corporate tax litigation.

On February 6, 1997, Mr. Prager filed a timely appeal with the Kansas Civil Service Board, contending that his suspension by Secretary LaFaver was contrary to Kan. Stat. Ann. § 75-2973, the Kansas "whistle-blower" statute. Specifically, Mr. Prager contended that his suspension was in retaliation for his reporting to Mr. Oxandale and Governor Graves that Secretary LaFaver had violated the tax laws in regard to the La Siesta Tax case.

On March 17, 1997, Mr. Prager sent another letter to Governor Graves, expressing Mr. Prager's concerns about a possible illegal tax refund in Tax Appeal A. This same issue had also been the subject of Mr. Prager's earlier memo of October 31, 1996, to Mr. Oxandale. The March 17 letter to Governor Graves stated in part:

> I am writing to inform you that in a currently pending corporate income tax administrative appeal ("Appeal A") it is apparent that Secretary Lafaver or Richard Oxandale, or both, intend to act so as to violate the law or violate their legal obligation to the State. The anticipated violation is likely to result in substantial injury to the State through the payment of an illegal refund, which could exceed $1.0 million in Appeal A.

* * * *

> In providing professional, legal representation in the course of my employment with the State of Kansas, the State of Kansas has always been and is my client. While Secretary Lafaver and Mr. Oxandale may have their own opinions regarding the La Siesta appeal, Appeal A and B or other tax appeals, it is my duty to differ with their opinions when they cause the tax laws to be violated. Please act to prevent Secretary Lafaver and Mr. Oxandale from causing an illegal refund to be issued in Appeal A.

Mr. Prager sent copies of his March 17 letter to both Secretary Lafaver and Mr. Oxandale.

On May 9, 1997, Secretary Lafaver sent an eleven-page letter to Mr. Prager, advising Mr. Prager that he would be terminated from his employment with the Department of Revenue effective May 16, 1997. In the first paragraph of this letter, the Secretary summarized his reasons for discharging Mr. Prager, saying:

> It is my belief that your actions as an attorney with this Department have evinced an overall lack of judgment, insubordination, violation of confidentiality in revealing private tax matters and matters concerning our former attorney-client relationship, acting contrary to the interests of your client and exhibiting personal conduct detrimental to the state service which has caused undue disruption of the normal operation and proper functioning of this Department, all and each of which constitutes gross misconduct on your part, and conduct grossly unbecoming an attorney with this Department.

On June 6, 1997, Mr. Prager filed a timely consolidated appeal with the Civil Service Board, contending

that his suspension and termination from employment were unreasonable and in violation of Kan. Stat. Ann. § 75-2973. Mr. Prager's appeal to the Civil Service Board is still pending.

On June 12, 1997, an article on Mr. Prager's appeal of his termination from employment was published in *The Topeka Capital-Journal*. The article in *The Topeka Capital-Journal* quoted several passages from Secretary Lafaver's termination letter of May 9, 1997, to Mr. Prager, including the following:

> 'Pursuant to my review of allegations made in your December 18, 1996, letter and memorandum, it has now become apparent to me that you have in fact engaged in a pattern of abusive and at times ruthless tactics in dealing with taxpayers and their representatives, and that this has been occurring for years.
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> * * * *
>
> 'These allegations of yours [concerning the La Siesta case] are obviously based on mere surmise and fantasy derived from newspaper articles. As such, your conduct was not only reckless and unethical, but constitutes gross misconduct.'

IV. DISCUSSION

Defendant advances the affirmative defense of qualified immunity as a ground for dismissal of plaintiff's claims. The defense of qualified immunity represents an "attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the

performance of their duties as a result of baseless claims." *Pueblo Neighborhood Health Centers, Inc. v. Losavio,* 847 F.2d 642, 645 (10th Cir. 1988). An assertion of qualified immunity requires evaluation under the standard articulated by the Supreme Court in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). In *Harlow,* the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Once a defendant to a 42 U.S.C. § 1983 action raises a qualified immunity defense, the burden shifts to the plaintiff to show both facts and law to establish that the defendant is not entitled to a qualified immunity. *Dixon v. Richer,* 922 F.2d 1456, 1460 (10th Cir. 1991). The plaintiff must "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that that law was clearly established when the alleged violation occurred." *Pueblo Neighborhood,* 847 F.2d at 646. If the plaintiff meets this burden, then the normal burden of the movant for a motion to dismiss falls again upon the defendant. *See id.* In the context of a qualified immunity defense, the Tenth Circuit has traditionally required plaintiffs to meet a heightened pleading standard. *See Sawyer v. County of Creek,* 908 F.2d 663, 667 (10th Cir. 1990).

If the plaintiffs fails to carry either part of his two-part burden, the defendant is entitled to immunity from suit and other demands of litigation. *Siegert v. Gilley,* 500 U.S. 226, 232-33 (1991); *Workman v. Jordan,* 958 F.2d 332, 336 (10th Cir. 1992). On the other hand, if the plaintiff

successfully meets his initial burden as a matter of law, he may be entitled to discovery on the immunity question before a motion for summary judgment on qualified immunity grounds can be resolved. *Anderson v. Creighton,* 483 U.S. 635, 646-47 n. 6 (1987); *Workman,* 958 F.2d at 336. The question of whether the defendant is entitled to qualified immunity is a legal one and the court cannot avoid the question by framing it as a factual issue. *Pueblo Neighborhood,* 847 F.2d at 645-46.

Following the *Harlow* analysis on qualified immunity, there is no dispute that as to the first prong the defendant was a "government official performing a discretionary function." *Harlow,* 457 U.S. at 818. The inquiry thus turns to the second *Harlow* prong – whether the defendant violated "clearly established statutory or constitutional rights of which a reasonable person would have known. . . . " *Id.* Therefore, the issue before the court is (1) whether plaintiff has alleged a deprivation of federal rights sufficient to state a claim under 42 U.S.C. § 1983 and, if so, (2) whether those rights were clearly established at the time of the deprivation.

A. Plaintiff's Free Speech Claim

"It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson,* 483 U.S. 378, 383 (1987). The threshold inquiry in determining if the employee had of a constitutionally protected interest in free speech is whether the "employee's speech touches upon a matter of public concern." *Melton v. City of Oklahoma City,* 879 F.2d

706, 713 (10th Cir. 1989), modified on other grounds, 928 F.2d 920 (10th Cir.) (en banc), *cert. denied*, 502 U.S. 906 (1991) (citing *Connick v. Myers*, 461 U.S. 138 (1983). Plaintiff alleges that his speech involved allegations of wrongdoing, inefficiency or other malfeasance on the part of certain government officials in the conduct of their public duties. Specifically, plaintiff claims his speech included allegations that: (1) officials in the Kansas Department of Revenue misinterpreted tax laws resulting in a potential illegal refund of one million dollars; (2) the Department of Revenue's administrative process was susceptible to circumvention by undue political influence; and (3) many taxpayers had a perception of unfair treatment by the Department of Revenue. Plaintiff's allegations of wrongdoing, inefficiency or other malfeasance, because they sought "to bring to light actual or potential wrongdoing or breach of public trust" on the part of defendants, *Connick*, 461 U.S. at 148, clearly concern matters of public interest. Plaintiff's "expression of potential wrongdoing did not address internal policies relevant only to department personnel nor involve essentially a private matter, but concerned information in which the public would definitely be interested." *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). Accordingly, the court concludes that plaintiff is properly characterized as a "whistle-blower" based on the allegations in the complaint. Defendant's argument that plaintiff's speech resulted from purely private concerns is ineffectual at this stage of the litigation and is more appropriately raised in a motion for summary judgment.

Since plaintiff's speech touched on a matter of public concern, the court must next balance "the interests of the

employee in making the statement against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public." *Melton*, 879 F.2d at 713 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). To justify restricting plaintiff's speech, defendant must show actual disruption of services resulting from plaintiff's speech and that the disruption outweighs the plaintiff's First Amendment rights. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 594 (10th Cir. 1994). employees. [sic] In *Rankin v. McPherson*, the Court stated:

> In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. [citations omitted]. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

483 U.S. 378, 388. Essentially, the focus is "on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Id.*

Although defendant undoubtedly has a legitimate concern about the disruption caused by plaintiff's allegations, "it would be absurd to hold that the First

Amendment generally authorizes [culpable] officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office." *Ramirez*, 41 F.3d at 594 (quoting *Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989)). The court is not convinced that at this stage of the proceedings, defendant has demonstrated that the state interest in the "efficiency of office" outweighs plaintiff's strong First Amendment interest in reporting possible official misconduct Defendant's arguments to the contrary involve unsupported factual allegations and are not properly addressed at this stage of the proceedings.

The court now must consider whether the complaint sufficiently alleges that the protected speech was a "motivating factor" in defendant's detrimental employment decision. *Melton*, 879 F.2d at 713 (quoting *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977)). A claim of retaliation may be established by "the only means available . . . circumstantial evidence." *Smith v. Maschner*, 899 F.2d 940, 949 (10th Cir. 1990). Here the complaint clearly pointed to such circumstantial evidence. Plaintiff alleges that the first adverse actions against him, suspension without pay, was instituted within one month after his first letter to the governor. Plaintiff also alleges that he was terminated from employment within two months of his second letter to the governor. In view of these and other allegations made in the complaint, the actions taken against plaintiff could reasonably support an inference of an unlawful retaliatory action.

Based on the allegations contained in the complaint, the court finds that plaintiff has sufficiently alleged the

deprivation of a free speech interest to state a claim under 42 U.S.C. § 1983. The court now turns to the question of whether the law was clearly established at the time of the events in question. To be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Although it is not necessary that the alleged violation has been previously held unlawful, "in the light of pre-existing law the unlawfulness must be apparent." *Id.* Generally, the law may be considered as clearly established if there exists a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts found the law to be as the plaintiff maintains. *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992), citing *Stewart v. Donges*, 915 F.2d 572, 582-83 & n. 14 (10th Cir. 1990). In deciding whether the law that the defendant allegedly violated was clearly established, the court must examine the law as it was at the time of the defendant's actions. *Wolfenbarger v. Williams*, 826 F.2d 930, 932 (10th Cir. 1987).

Defendant argues that there are no analogous Supreme Court or Tenth Circuit cases such that the law was clearly established with respect to the conduct in question here. Defendant further implies that existing authority is inapplicable in light of the Kansas whistle-blower statute, Kan. Stat. Ann. § 75-2973(c)(4), which specifically authorizes disciplinary action against an employee for confidential disclosures. This argument, however, turns on several factual assumptions, including defendant's assertion that plaintiff's speech disclosed confidential taxpayer information. As such, it is more

appropriately raised in a motion for summary judgment. Defendant's argument, moreover, relies on an excessively narrow view of the requirement of analogous precedent. While it is true that the law must be clearly established in a "particularized" sense, this particularity requirement does not mean that the very action in question has been held unlawful. Instead, it only requires that "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The law in a general sense was clearly established at the time of the events in question here. *See, e.g., Rankin v. McPherson*, 483 U.S. at 383; *Arnold v. Oklahoma County Bd. of County Com'rs*, 77 F.3d 492 (10th Cir. 1996). Accordingly, the issue is whether defendant should reasonably have been on notice that plaintiff's speech in particular was protected and he could not prevail in the *Pickering* balancing of interests. *See Powell v. Gallentine*, 992 F.2d 1088, 1090 (10th Cir. 1993). Based on the allegations stated in the complaint, and the law of the Tenth Circuit, the court finds that defendant should reasonably have been on notice that plaintiff's speech was protected and that plaintiff's free speech interests could outweigh the state's interest in "efficiency of office."

B. Plaintiff's Liberty Interest Claim

"Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). *See Workman*, 32 F.3d at 475. "Once a liberty interest is implicated, the due process protections of the Fourteenth

Amendment are activated and plaintiff[ ] must show that [he was] not afforded an adequate hearing." *Jensen v. Redevelopment Agency of Sandy City*, 998 F.2d 1550, 1558 (10th Cir. 1993) (citing *Board of Regents v. Roth*, 408 U.S. 564, 573, 577 (1972)). Therefore, plaintiff must first show a liberty interest exists and then that the liberty interest was infringed upon.

The law is clear that plaintiff "has a liberty interest in his good name and reputation as it affects his protected property interest in continued employment." *Workman*, 32 F.3d at 480 (citing *Paul v. Davis*, 424 U.S. 693 (1976); *McGhee v. Draper*, 639 F.2d 639, 643 (10th Cir. 1981)). However, plaintiff must show how the government infringed upon this liberty interest. To do so, plaintiff must allege: (1) statements by a government actor which impugn his good name, reputation, honor, or integrity; (2) the falsity of such statements; (3) the occurrence of such statements in the course of termination, or the foreclosure of other employment opportunities by such statements; and (4) the publication of such statements. *Workman*, 32 F.3d at 480 (citations omitted).

Based on the allegations contained in the complaint, the court finds that plaintiff has sufficiently alleged the deprivation of a liberty interest. Defendant argues, however, that plaintiff offers no evidence that defendant was the one who published the stigmatizing statement, and thus failed to establish all the elements of his liberty claim. This argument is evidentiary in nature and therefore inappropriate at this stage of the proceedings. Defendant also argues that the statements in defendant's letter of termination were not of the type to impugn plaintiff's good name, reputation, honor, or integrity. The court

disagrees. Accusations of reckless and unethical behavior are clearly the type of statements recognized by the law as stigmatizing. *See, e.g., Roth,* 408 U.S. at 572-3.

Having sufficiently alleged the deprivation of a liberty interest, plaintiff must also allege that he was deprived of an adequate name-clearing hearing to state a claim under 42 U.S.C. § 1983. *Wisconsin v. Constantineau,* 400 U.S. at 437; *Workman,* 32 F.3d at 480 ("Once a liberty interest is implicated, the due process protections of the Fourteenth Amendment are innervated and [the plaintiff] must show he was not afforded an adequate name-clearing hearing"). This, however, plaintiff has not done. Accordingly, plaintiff's 42 U.S.C. § 1983 claim for liberty deprivation must be dismissed.

C. Conclusion

The court finds that the complaint in this case properly states a claim under 42 U.S.C. § 1983 for deprivation of plaintiff's free speech interest, and that it is premature, in the absence of a more complete factual record, to grant qualified immunity to this claim on the basis of the pleadings. Defendant, however, retains the right to assert the qualified immunity defense throughout the proceedings, as the facts develop more fully. *See Oladeinde v. City of Birmingham,* 963 F.2d 1481, 1487 (11th Cir. 1992) (rejecting the qualified immunity defense at the motion to dismiss stage, but emphasizing defendants' right to assert the qualified immunity defense in subsequent proceedings). The court also finds that plaintiff fails to state a claim under 42 U.S.C. § 1983 for deprivation of liberty. However, since the court cannot determine for certain

whether plaintiff can cure the pleading deficiencies, plaintiff will be granted leave to file an amended complaint as to his deprivation of liberty claim.

IT IS THEREFORE BY THE COURT ORDERED that defendant's motion pursuant to Fed. R. Civ. P. 12(b) (6) to dismiss (Doc. 5) is denied in part and granted in part. Defendant's motion is denied with respect to plaintiff's deprivation of free speech claim and is granted with respect to plaintiff's deprivation of liberty claim.

IT IS FURTHER ORDERED that plaintiff is granted leave to file an amended complaint to cure the deficiencies noted above within forty-five days of this order.

Dated this 9 day of April, 1998, at Topeka, Kansas.

/s/ DALE E. SAFFELS
DALE E. SAFFELS
United States District Judge

APPENDIX C

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 12(b)(6) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall

be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX D

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS DIVISION SIX

DAVID PRAGER, III, Plaintiff, v. STATE OF KANSAS, KANSAS DEPT. OF REVENUE, ET AL., Defendants.	)	Case No. 99-C-17

MEMORANDUM DECISION AND ORDER

(Filed Jul. 1, 1999)

The above-captioned case comes before the Court on Defendant's Motion to Dismiss pursuant to K.S.A. 60-212(b)(6). After careful consideration, the Court hereby concludes as follows:

FACTS

1. Plaintiff David Prager, III, held the position of Attorney III with the Department of Revenue from 1988 until his termination on May 16, 1997.

2. On October 31, 1996, while employed for the Department of Revenue as an Attorney III, Plaintiff delivered a memo to his supervisor, Richard Oxandale, general counsel for the Department of Revenue. At that time, Plaintiff was in charge of a corporate income tax appeal, hereinafter referred to as Tax Appeal A. In this memo,

Plaintiff stated that the tax laws had been misinterpreted by Mr. Oxandale and the Secretary of the Department of Revenue, John D. LaFaver, in another tax appeal (hereinafter Tax Appeal B) which involved the same issue as Tax Appeal A, i.e. whether a federal agreement to extend the federal assessment limitation period extends the time period for a Kansas refund claim under K.S.A. 79-3230(e). He stated that little or no research had been done in arriving at this erroneous interpretation and that this erroneous interpretation resulted in an illegal tax refund of approximately $1.0 million to taxpayer B. Plaintiff's memo included three pages of legal analysis and included a request for a meeting with Mr. Oxandale and Secretary LaFaver. No meeting was every scheduled.

3. On December 18, 1996, Plaintiff Prager sent a letter and twelve-page memo to Governor Bill Graves. The letter provided in relevant part[1]:

> I am the senior state tax attorney who has been the subject of several personal attacks in the Topeka Capitol Journal. Although I have up to now endured this criticism without a formal response, the December 8th editorial which said that my actions were an "outrage" causes me to step forward to personally explain to you what I know is the truth. Please consider and determine for yourself that La Siesta was not legally entitled to the pre-1995 credits and that the 1995 law should not have caused the abatement of La Siesta's pre-1995 liability. I am confident that when these articles and the issues they raise are

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[1] The bracketed portions have been inserted by the Court.

examined . . . , the distortions and false accusations in them will become apparent.

La Siesta was not legally entitled to tax credits that it claimed. While the construction of its facility commenced in June of 1982, the enterprise zone was not designated until October of 1982. Because the facility was established well before the enterprise zone designation, La Siesta did not qualify for the enhanced enterprise zone credits. . . . [The letter proceeds with a paragraph explaining the error in law applied to La Siesta's return].

* * * *

It is evident that S. Lucky DeFries misled you and your staff to the erroneous conclusion that La Siesta's assessment should be abated. Many of the statements in the La Siesta's article are false, and I assume that Mr. DeFries made the same and other misstatements to you. . . .

There have been other false accusation that I am unfair. . . . When the specific facts are examined for La Siesta, it should become clear to you that the criticism being leveled at me is totally unwarranted and that the abatement of La Siesta's assessment was in fact illegal. Although I certainly do believe in providing fair and courteous service to Kansas taxpayers, this does not include allowing a taxpayer to circumvent the law and it never will.

As a lawyer for the State of Kansas, I believe it is my duty to represent the state to the best of my ability. If there is a problem resulting from the enforcement of the present law, the remedy should be change in the law rather than

a direction to the Department's staff to bend the law or grant favors under the law.

Because I have a great deal of respect for you as a thoughtful and fair person and I believe that the erroneous decision to abate the La Siesta assessment was caused by reliance upon the misrepresentations of Mr. DeFries, I am addressing these matters to you personally. . . .

The attached Memorandum to this letter provided in part:

In November and December of 1996, I have been the object of several personal attacks in the Topeka Capital Journal. These attacks are unfair and untrue. I believe they have been orchestrated in large part by S. Lucky DeFries. . . .

[The next 11 paragraphs contain information on Plaintiff's employment with the Kansas Department of Revenue and his service on the MTC Litigation Committee.]

Recent Background. After you took office, I believe some taxpayers thought that I would be forced to leave. . . . I have no doubt that you have received a lot of complaints about me, simply because the nature of my work is largely adversarial and because of the attraction of taxpayers pursuing political influence to circumvent the administrative hearing process. . . .

Perhaps in a response to a memo from you, Richard Oxandale told me on October 14, 1996, that Secretary LaFaver wanted me to be relieved of responsibility for my tax appeals, which is most of what I do. The taxes at issue in my appeals are currently roughly $100 million. I

met with LaFaver on October 16th. The attached memo [ ] dated November 4, 1996 describes these two meetings, which were rather odd. On November 4th we met again and I said to them that I would not permit this injustice to be done to me. We never did discuss any particular issues or complaints. This led me to believe that LaFaver was possibly going to attack me to deflect criticism against the Department. LaFaver and Oxandale both said throughout all these meetings that they thought my work performance was otherwise excellent.

[The memo then lists eight different newspaper articles and their publication date. The memo then blames DeFries' influence on the Governor as the reason for the eventual concession by Secretary LaFaver of the La Siesta credits issue. The memo then discusses in detail how each of the eight newspapers articles is untrue.]

Where we Appear to Be Going. Anti-government and anti-tax attitudes, combined with Mr. DeFries' demagogic lobbying and false accusations appear to be inciting new legislation to irrationally punish the Department of Revenue and its employees. This irrational anger and the false accusations which serve to inflame them are a very poor basis for responsible legislative action.

[The memo then discusses three questions Plaintiff feels need to be asked in order to address Kansas' tax rates and then discusses three causes of taxpayer perceptions of unfairness which have been eliminated – foreign dividends, interest rate on tax underpayments at 18%, windfall profits taxes.]

> I know that a system of taxation based upon false accusation, intimidation, political influence and corruption is something you would like to avoid. I think we all need to take a time out to determine what is really happening here and to determine what action is and is not appropriate.

4. On December 30, 1996, Plaintiff delivered another memo to Mr. Oxandale, setting forth his analysis of a settlement offer made by the taxpayer in Tax Appeal A. He stated he did not believe Taxpayer A was legally entitled to a refund and that the settlement offer should be declined.

5. On January 8, 1997, Secretary LaFaver sent a letter to Plaintiff stating in relevant part:

> I am in receipt of your unfortunate correspondence to the Governor regarding an array of tax issues at the Department of Revenue. In that correspondence you make a number of extremely serious allegations and characterization of events that seem to compromise your ability to fairly and judiciously represent the Kansas Department of Revenue as a tax attorney. I have counseled you that, while you are knowledgeable in corporate tax law, you have a problem acknowledging weaknesses of your cases. Your zeal to "win" can detract from a fair and sensible public policy outcome.
>
> Your letter illustrates better than any allegation I have heard your insensitivity to dealing with taxpayers in an unemotional and professional manner. You have imagined events that did not occur, and you have characterized actions of the Governor and me that I took with full legal advice as "illegal."

> That you chose to send such a letter to the Governor without discussing it with General Counsel or me reflects poorly upon your judgment and your willingness and ability to work as a member of this team. Clearly the letter required a thorough review of matters alluded to in the letter as well as other matters relating to the fairness and propriety of actions that department has taken in corporate tax litigation. This review must be and must appear to be professional and impartial. In order to assure the required impartiality, it will not be appropriate for you to continue your duties while this review is conducted.
>
> Accordingly, this letter is to inform you that you are suspended from employment, with pay. . . .
>
> * * *
>
> I sincerely regret having to take this action. However, your actions have left me no choice.

6. On February 6, 1997, Plaintiff filed an appeal with the Kansas Civil Service Board. He contended that his suspension was in violation of K.S.A. 1996 Supp. 75-2973, the Kansas "whistle-blower" statute. The hearing on Plaintiff's claim has not yet been held and is not scheduled to be held until September of 1999.

7. On March 17, 1997, Plaintiff sent another letter to Governor Graves. In this letter, he expressed concerns about a possible illegal tax refund in Tax Appeal A. This letter stated in part:

> I am writing to inform you that in a currently pending corporate income tax administrative appeal ("Appeal A") it is apparent that

> Secretary LaFaver or Richard Oxandale, or both, intend to act so as to violate the law or violate their legal obligation to the State. The anticipated violation is likely to result in substantial injury to the State through the payment of an illegal refund, which could exceed $1.0 million in Appeal A.
>
> * * *
>
> In providing professional, legal representation in the course of my employment with the State of Kansas, the State of Kansas has always been and is my client. While Secretary LaFaver and Mr. Oxandale may have their own opinions regarding the La Siesta appeal, Appeal A and B or other tax appeal, it is my duty to differ with their opinions when they cause the tax laws to be violated.
>
> Please act to prevent Secretary LaFaver and Mr. Oxandale from causing an illegal refund to be issued in Appeal A.

8. On May 9, 1997, Secretary LaFaver sent Plaintiff an eleven-page letter. It stated in part:

> This is to advise you that I have made the decision to propose the termination of your employment as a staff attorney with the Kansas Department of Revenue. . . . It is my belief that your actions as an attorney with this department have evinced an overall lack of judgment, insubordination, violation of confidentiality in revealing private tax matters and matters concerning our former attorney-client relationship, acting contrary to the interests of your client and exhibiting personal conduct detrimental to the state service which has caused undue disruption of the normal operation and proper functioning

of this Department, all and each of which constitutes gross misconduct on your part, and conduct grossly unbecoming an attorney with this Department.

The effective date of your proposed termination will be May 16, 1997.

* * *

You are offered the opportunity to reply in writing, or appear in person, or both, before me or my designee, on the issue of your proposed dismissal. If you wish to reply in writing, you [sic] correspondence must be received before May 16, 1997. If you wish to appear in person, you may appear in the Office of The Secretary at 1:30 p.m. on Thursday, May 15, 1997. You may represent yourself or be represented by a person of your choice. If you wish to appear in person you must notify the Director of Personnel at least one working day in advance of the hearing, in this case, Wednesday, May 14, 1997. If you wish to appear in person, represented by counsel, the Wednesday, May 14, 1997, notification must identify the name of the counsel or firm representing you.

* * *

9. On June 6, 1997, Plaintiff filed an appeal with the Kansas Civil Service Board concerning his termination. His termination appeal has been consolidated with his suspension appeal and both are currently pending.

10. On June 12, 1997, an article appeared in the Topeka Capital Journal regarding Plaintiff's termination from the Department. The article quoted several passages from Secretary LaFaver's termination letter.

11. On January 7, 1999, Plaintiff filed his petition, seeking declaratory and injunctive relief for violation of 42 U.S.C. § 1983, recovery for damages under the Kansas Tort Claims Act (the KTCA) for deprivation of Plaintiff's constitutional right of free speech and due process, for retaliatory discharge based on "whistle-blowing" and for false light publicity.

12. Defendant Secretary Karla Pierce is current Secretary of the Department of Revenue.

13. On March 16, 1999, Defendants filed a Motion to Dismiss pursuant to K.S.A. 60-212(b)(6).

CONCLUSIONS OF LAW

The first issue is whether Defendants' Motion to Dismiss should be treated as a Motion for Summary Judgment since Defendants attached various exhibits to their motion. Plaintiff contends that if the Court considers these exhibits Defendants' motion must be converted to a Motion for Summary Judgment pursuant to K.S.A. 60-212(b). Defendants argue that since Plaintiffs referred to, quoted from and bases his claim on these exhibits but failed to attach them to his petition that they are allowed to attach these exhibits as part of a motion to dismiss without converting it to a motion for summary judgment.

The Court agrees with Defendants. In *GFF Corp. v. Associated Wholesale Grocers, Inc.*, cited by Defendants, the Tenth Circuit Court of Appeals stated:

> A 12(b)(6) motion must be converted to a motion for summary judgment if "matters outside the pleading are presented to and not

> excluded by the court" and "all parties . . . [are] given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The failure to convert a 12(b)(6) motion to one for summary judgment where a court does not exclude outside materials is reversible error unless the dismissal can be justified without considering the outside materials. Notwithstanding these general principles, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may subject an indisputably authentic copy to the court to be considered on a motion to dismiss.
>
> If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied. Moreover, conversion to summary judgment when a district court considers outside materials is to afford the plaintiff an opportunity to respond in kind. When a complaint refers to a document and the document is central to the plaintiff's claim, the plaintiff is obviously on notice of the document's contents, and this rationale for conversion to summary judgment dissipates.

GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (citations omitted).[2] Thus, the Court may consider those exhibits in Defendants' Motion

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[2] Although this case interprets Federal Rule 12(b), "[Kansas courts] have repeatedly noted that federal cases interpreting rules identical to those existing in the Kansas Code of Civil Procedure are entitled to 'persuasive weight.' " *In re Marriage of Larson*, 257 Kan. 456, 462, 463 (1995) (citations omitted).

to Dismiss which were referenced in Plaintiff's petition without converting Defendants' motion into a motion for summary judgment.[3]

The standard for granting a motion to dismiss for failure to state a claim is as follows:

> "Disputed issues of fact cannot be resolved or determined on a motion to dismiss for failure of the petition to state a claim upon which relief can be granted. The question for determination is whether in the light most favorable to plaintiff, and with every doubt resolved in plaintiff's favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate plaintiff does not have a claim.
>
> "In considering a motion to dismiss for failure of the petition to state a claim for relief, a court must accept the plaintiff's description of that which occurred, along with any inferences reasonably to be drawn therefrom. However, this does not mean the court is required to accept conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened, or if these allegations are contradicted by the description itself."
>
> In addition, "it is our duty to determine whether those pleaded facts and inferences state a claim, not only on the theory which may be

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[3] Defendants attached two documents, Exhibits D and E, which were not specifically referenced in Plaintiff's petition and hence will not be considered by the Court in discussing Defendants' Motion to Dismiss.

> espoused by the plaintiffs, but on any possible theory we can divine."

Colombel v. Milan, 24 Kan. App. 2d 728, 729 (1998) (citations omitted).

Defendants raise several arguments in their Motion to Dismiss. Before discussing these arguments though, the Court must first decide whether it has jurisdiction to hear Plaintiff's § 1983 claim despite Plaintiff's action pending before the Kansas Civil Service Board. According to K.S.A. 75-2929h, "the act for judicial review and civil enforcement of agency actions shall be applicable to appeals from orders of the civil service board." Pursuant to K.S.A. 77-621 of the KJRA, "a person may file a petition for judicial review under this act only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review. . . . " Defendants claim that Plaintiff is seeking the exact same remedy here as he is in his appeal before the Board, i.e. reinstatement to his former position. Thus, Defendants contend Plaintiff is required to exhaust his administrative remedies before proceeding with this suit.

The Court agrees with Defendant. Although the United States Supreme Court in *Patsy v. Florida Board of Regents* held that exhaustion of administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983, the Court disagrees and holds that in state court, Plaintiff is required to exhaust his administrative remedies when those remedies are adequate before bringing a separate federal cause of action.

In *Pet v. Dept. of Health Services*, the Supreme Court of Connecticut stated:

> The United States Supreme Court has held that exhaustion of state administrative remedies is not a prerequisite to an action for damages under § 1983. Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); see also Laurel Park, Inc. v. Pac, 194 Conn. 677, 690, 485 A.2d 1272 (1984). *We also noted in Laurel Park, *369 Inc. v. Pac, supra, at 691, 485 A.2d 1272, which included a § 1983 count, that notwithstanding Patsy v. Board of Regents of the State of Florida, supra, the fundamental requirement of inadequacy of an available legal remedy in order to obtain injunctive relief remains in full force. In Laurel Park, Inc. where, as here, it did not appear that the trial court relied on the viability of the § 1983 count in rendering judgment. **684 we clearly said: "The inadequacy of an available legal remedy is a standard prerequisite for injunctive relief. We do not view Patsy v. Board of Regents of the State of Florida, supra, as having abrogated this fundamental requirement for injunctive relief even in the federal courts. A fortiori, it remains a condition precedent to injunctive relief in a state court, since none of the concerns expressed in Patsy that warranted this exception to the exhaustion doctrine would be applicable where the same tribunal must determine the issues whether raised in an administrative appeal or in a separate action."* Laurel Park, Inc. v. Pac, supra, at 691, 485 A.2d 1272. As we explain below, the available legal remedy is adequate and no form of injunctive relief, under § 1983 or otherwise, is justified as an exception to the exhaustion requirement in this case even if we assume, arguendo, that the trial court ever considered the § 1983 count. The

> plaintiff appears to ask that his alleged irreparable injuries be remedied via a judgment under § 1983. He does not distinguish, however, any difference between the remedies sought under his count for a temporary injunction and the § 1983 count. In Patsy v. Board of Regents of the State of Florida, supra, and other leading cases, it was a § 1983 action for damages in federal court that the plaintiff argued should not be dismissed for failure to exhaust his state remedies. See, e.g., Costello v. Fairfield, 811 F.2d 782, 785 (2d Cir.1987); Solomon v. Emanuelson, 586 F.Sup. 280, 284 (D.Conn.1984). In contrast, the plaintiff in this case attempts to use the *370 later filing of a § 1983 action to forestall an invocation of the exhaustion doctrine against an independent injunctive claim that he had previously filed. See also James v. Jennings, 735 S.W.2d 188, 190 (Mo.App.1987) (a § 1983 action filed in state court does not take jurisdiction away from state administrative agency). We find that the filing of this § 1983 count does not permit the plaintiff to avoid the exhaustion doctrine.

Pet v. Dept. of Health Services, 207 Conn. 346, 368, 369, 370, 542 A.2d 672, 683, 684 (Conn. 1988) (citations omitted).

The Court finds that Plaintiff's remedy with the Civil Service Board is adequate and that he should not be allowed to seek injunctive relief, an extraordinary remedy, until he has exhausted his adequate legal remedies, i.e. his administrative remedies before the Kansas Civil Service Board. Therefore, the Court dismisses Plaintiff's § 1983 claim for failure to exhaust administrative remedies.

Plaintiff's remaining claims seek damages under the Kansas Tort Claims Act for deprivation of Plaintiff's constitutional rights of free speech and due process, retaliatory discharge based on "whistle-blowing" and false light publicity. The Court has jurisdiction over these claims despite Plaintiff's failure to exhaust administrative remedies as "the KJRA does not apply to civil tort actions against an administrative agency." *See Lindenman v. Umscheid*, 255 Kan. 610, 619 (1994). Defendants argue that Plaintiff's claims under the KTCA based on deprivation of his constitutional rights of due process and freedom of speech fail to state a claim as violations of one's constitutional rights are not actionable under the KTCA. Defendants contend that the KTCA provides that a governmental entity will be held liable for the damages caused by the torts of its employees only where the governmental entity, if a private person, would be liable. Since there is no Kansas statutory or common law cause of action in which a private person could be found liable for a deprivation of a plaintiff's constitutional rights, Defendants argue that neither a governmental entity nor its employees may be held liable for the deprivation of one's constitutional rights.

Plaintiff argues that the Kansas Supreme Court has recognized a common law cause of action for violation of one's federal or state constitutional rights. He points to three cases which he claims recognize a cause of action for violation of the constitutional right of due process (*Kennedy v. Board of Shawnee County Comm'rs, Kansas Dept. of SRS v. Goertzen*, and *Wertz v. Southern Cloud Unified School District*) and one case which he claims supports a

cause of action for the violation of the constitutional right of free speech (*Larson v. Ruskowitz*).

The Court agrees with Defendants. In *FDIC v. Meyer*, the United States Supreme Court found, in holding that the Federal Tort Claims Act (FTCA) was not Plaintiff's exclusive remedy, that a plaintiff's constitutional tort claim is not actionable under the FTCA, 28 U.S.C. § 1346(b). It stated:

> [T]o be actionable under § 1346(b), a claim must allege, inter alia, that the United States "would be liable to the claimant" as "a private person" "in accordance with the law of the place where the act or omission occurred." A constitutional tort claim such as [plaintiff's] could not contain such an allegation.

FDIC v. Meyer, 127 L.Ed.2d 308, 318 (1994).

K.S.A. 75-6103(a) provides similar language to 28 U.S.C. § 1346(b). It provides:

> Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

Although Plaintiff cites to four cases, none of them create or provide for a separate cause of action for a constitutional tort and even if they did, all of the cases involve liability of a governmental entity. Thus, none of the cases offered find that a private person could be held liable for a constitutional tort and therefore, since a private person

cannot be held liable for a constitutional tort, a governmental entity and its employees can not be held liable under the KTCA for a constitutional tort. Thus, the Court holds that Plaintiff's KTCA claims based on deprivation of Plaintiff's due process and first amendment rights should be dismissed.

As to Plaintiff's KTCA claim based on retaliatory discharge, Defendants argue that Plaintiff's communications to the Governor cannot be classified as whistle-blowing. Defendants argue that in order to constitute whistle-blowing in Kansas, the Plaintiff must show that his communication concerned a co-worker or his employer and it was done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy, or personal gain. Defendants contend that nowhere in the letter and memorandum to the Governor does Plaintiff mention any illegal or wrongful activity by Mr. LaFaver that could be viewed as relating to whistle-blowing. They argue that the reason Plaintiff wrote the letter was due to the December 8th editorial which labeled Plaintiff's actions as an "outrage" and which called Plaintiff "unfair". They contend then that Plaintiff wrote the letter not out of a good faith concern over wrongful activity but out of personal motives. In addition, they argue that since Plaintiff's letter to Governor Graves disclosed confidential tax payer information, Defendants and Mr. LaFaver were not prohibited from firing them under the Kansas Whistle-blower statute. They contend Plaintiff used poor judgment and failed to take steps available to him that a reasonably prudent attorney would have taken prior to reporting alleged violations to the Governor and thus

destroying his effectiveness as counsel for the Department.

The Court concludes that Plaintiff has not stated a valid claim for whistle-blowing because K.S.A. 75-2973, the Kansas Whistleblower statute, does not "prohibit disciplinary action of an employee who discloses information which: . . . (C) is confidential or privileged under statute or court rule." Here, Plaintiff disclosed confidential tax information he was privy to due to his position in the Department. Thus, the Court finds that Plaintiff cannot state a valid claim under whistle-blowing because K.S.A. 75-2973 specifically allows disciplinary action to be taken against Plaintiff.

Defendants also argue that Plaintiff's false light publicity tort claim is without merit. He argues that Plaintiff cannot sustain a claim of false light publicity on matters that he made public himself. He contends that Plaintiff made his termination letter public by attaching it to the appeal he filed with the Kansas Civil Service Board. Since the newspaper article containing the alleged stigmatizing statements taken from Plaintiff's letter of termination appeared after Plaintiff attached it to his appeal, Defendants contend that Plaintiff's false light publicity claim is unactionable.

Plaintiff argues that it has provided at least one scenario in which it is possible that Defendants caused the article to be published in the Topeka Capital Journal. He alleges that his employment with the Department of Revenue had been the subject of previous news media reports and thus it is reasonable to conclude that Secretary LaFaver was either personally involved in the publication

of the stigmatizing statements about Plaintiff in the June 12 article or that he set in motion a series of events by others which he should reasonably have known would result in publication of these stigmatizing statements.

The Kansas Supreme Court in *Dominguez v. Davidson* stated:

> [F]alse light/invasion of privacy is one of four types of invasion of privacy and the elements of the false light types are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person."

Dominguez v. Davidson, 266 Kan. 112, 121 (1999). The element of "publication" in false light invasion of privacy requires "publicity" which means "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Id.*

The element at dispute here is not whether Plaintiff's information was "publicized" but whether the Defendants were responsible for the publication. The Court agrees with Defendants. The newspaper article of June 12 refers to Plaintiff's appeal to the Kansas Civil Service Board. Since the records of the Civil Service Board are public records, the author of this article had access to any information contained therein. Since Plaintiff attached his termination letter to his appeal, he himself made the information public. Thus, the information was made public by Plaintiff and thus in essence, he himself "set in

motion" the possibility of it being publicized. The Court concludes that Plaintiff's false light publicity claim fails.

In conclusion, the Court finds all of Plaintiff's claims without merit. Thus, Defendant's Motion to Dismiss is granted.

The foregoing Memorandum Decision and Order shall serve as the Court's Entry of Judgment, no further journal entry being required.

Dated this 1st day of July, 1999.

/s/ Terry L. Bullock
Terry L. Bullock
District Court Judge